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No. 05-18

# In the Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, PETITIONER

*v.*

PEARL MURPHY, ET VIR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1415(i)(3)(B), which provides that the court may "award reasonable attorneys' fees as part of the costs" to a prevailing party, authorizes an award of expert fees.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A) and 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child

with a disability in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4). If the parents are not satisfied with the IEP, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency or by the local education agency." 20 U.S.C. 1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, parents have the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). A party aggrieved by a decision at the final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. 1415(i)(2)(A).

Parents who prevail in an action brought under IDEA may be awarded attorneys' fees. IDEA's fee-shifting provision states:

> In any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorneys' fees as part of the costs* to the parents of a child with a disability who is the prevailing party.

20 U.S.C. 1415(i)(3)(B) (emphasis added).

2. Respondents are the parents of a child with a disability covered by IDEA. In 1999, they commenced this action *pro se* in federal district court pursuant to IDEA, alleging that petitioner had failed to provide a "free appropriate public education" for their child, 20 U.S.C. 1400(d)(1)(A), and was therefore required to pay their child's private school tuition for certain school years. Pet.

App. 2a-3a. Respondents prevailed in district court, and the Second Circuit affirmed that judgment. *Id.* at 3a.[1]

The case returned to the district court and respondents sought fees and costs pursuant to 20 U.S.C. 1415(i)(3)(B), including $29,350 in fees for the services of Marilyn Arons, an educational expert and consultant. Pet. App. 3a. The district court granted the fee request in part. *Id.* at 4a, 17a-43a. The court held that Arons's fees for "expert consulting services" were compensable under the Act from the time respondents requested an administrative due process hearing until they became "prevailing parties" in 2000 when the district court entered judgment in their favor. *Id.* at 4a-5a, 37a-38a. However, the court held that respondents "could not collect 'attorneys' fees' for [Arons] doing work similar to that of an attorney." *Id.* at 4a. Applying that understanding, the court awarded respondents $8650 in expert fees for Arons's services. *Id.* at 5a-6a, 41a-43a.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court acknowledged that in *West Virginia University Hospital, Inc.* v. *Casey*, 499 U.S. 83 (1991), this Court held that virtually identical language in the then-current version of 42 U.S.C. 1988 did not authorize awards of expert fees, because "there was no 'explicit statutory authority' indicating that Congress intended for that sort of fee-shifting." Pet. App. 8a-9a (quoting *Casey*, 499 U.S. at 87). The court found, however, that the statement in the House Conference Committee Report on IDEA's predecessor, the Handi-

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[1] In the initial appeal in this case, the United States filed an amicus brief in support of respondents addressing the application of IDEA's stay-put provision, 20 U.S.C. 1415(j), and petitioner's liability for tuition payments. The brief did not address the availability of attorney or expert fees, which were not at issue before the Second Circuit at that merits stage. U.S. Br., *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) (No. 00-7358).

capped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case" demonstrated that Congress intended that expert fees be compensable under IDEA. *Id.* at 9a (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986)). The court of appeals also noted that this Court, in dicta in a footnote in *Casey*, described this statement in the committee report as "an apparent effort to *depart* from ordinary meaning and to define a term of art," and concluded that this Court thereby intended to distinguish IDEA from Section 1988 as construed in *Casey*. *Ibid.* (quoting *Casey*, 499 U.S. at 92 n.5).

The court of appeals also found it "instructive" that after *Casey*, Congress amended Section 1988 to allow recovery of expert fees in civil rights actions, but took no "similar action with respect to the IDEA." Pet. App. 10a. The court "believe[d] it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the committee report that prevailing parties could recover expert fees under the Act." *Ibid.* In addition, the court reasoned, awarding expert fees was consistent with IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education. *Id.* at 11a-12a.

The court of appeals recognized that its decision in this case directly conflicts with the holdings of the Seventh and Eighth Circuits that expert fees are not compensable under IDEA, but stated that its reading of the statute and this Court's cases required it to reject those decisions and, instead, join the Third Circuit in ruling that expert fees

are compensable. See Pet. App. 4a, 7a n.5, 8a (citing *Neosho R-V Sch. Dist.* v. *Clark*, 315 F.3d 1022 (8th Cir. 2003); *T.D.* v. *LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003); *Arons* v. *New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), cert. denied, 488 U.S. 942 (1988)); *id.* at 13a.

4. After the Second Circuit issued its decision in this case, a divided panel of the District of Columbia Circuit held—in accord with the rule in the Seventh and Eighth Circuits—that IDEA does not authorize an award of expert fees to prevailing parents. *Goldring* v. *District of Columbia*, 416 F.3d 70 (2005). In so holding, that court specifically acknowledged the Second Circuit's contrary ruling in this case and the conflict in the circuits. *Id.* at 73.

## DISCUSSION

The Court should grant the petition for a writ of certiorari in this case to decide whether IDEA's fee-shifting provision authorizes an award of expert fees to prevailing parents. As the Second Circuit expressly acknowledged, the circuits are divided on whether IDEA's fee-shifting provision authorizes reimbursement for such fees. Pet. App. 8a. The Second Circuit's conclusion that the Act allows for the award of expert fees to prevailing parents contradicts the plain language of IDEA and departs from this Court's precedents construing nearly identical statutory provisions. Resolution of this conflict is warranted in view of the recurring nature of the expert-fee issue in IDEA litigation, Congress's efforts to reduce IDEA-related litigation costs, and the need to ensure IDEA's uniform application.

### A. The Circuits Are Divided On Whether Expert Fees Are Recoverable Under IDEA's Fee-Shifting Provision

1. As both the Second Circuit below (Pet. App. 7a-8a) and respondents (Br. in Opp. 2-3) have acknowledged, the

Second Circuit's holding that Section 1415(i)(3)(B) authorizes the award of expert fees to prevailing parents squarely conflicts with the decisions of other federal courts of appeals.

a. Most recently, the District of Columbia Circuit in *Goldring* v. *District of Columbia*, 416 F.3d 70, 73 (2005), addressed whether Section 1415 "enables a prevailing party to recover expert fees as part of his costs." In so doing, it acknowledged the conflict among the circuits on this issue and expressly considered and rejected the reasoning and holding of the Second Circuit in this case. *Ibid.* Indeed, in rejecting the Second Circuit's approach, the court stated that the "correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees." *Ibid.*

The District of Columbia Circuit reasoned that its conclusion "flows directly from the application of two Supreme Court decisions," namely, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and *West Virginia University Hospital, Inc.* v. *Casey*, 499 U.S. 83 (1991). *Goldring*, 416 F.3d at 74 (citation omitted). As the District of Columbia Circuit explained, *Crawford* held that, in awarding fees to the prevailing party for expert services, a court is limited to the costs allowed by 28 U.S.C. 1821(b), "absent contract or explicit statutory authority to the contrary," 416 F.3d at 73 (citing *Crawford*, 482 U.S. at 439). *Casey*, in turn, held that language materially identical to IDEA's fee-shifting provision contained in Section 1988 "contains no such 'explicit statutory authority to the contrary,'" *ibid.* (quoting *Casey*, 499 U.S. at 86).

Accordingly, the court in *Goldring* concluded that the logic of *Crawford* and *Casey* controls whether expert fees are recoverable under IDEA:

> [B]ecause section 1415 and the version of section 1988 construed in *Casey* contain materially identical language and *Casey* held that section 1988's language does not enable a prevailing party to shift his expert fees, we cannot but conclude that section 1415 does likewise. That is the end of the matter for us.

416 F.3d at 74. In so holding, the court emphatically refused to alter its interpretation on the basis of the conference report accompanying IDEA's fee-shifting provision, which stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the * * * case." *Ibid.* (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986)). The court explained that "[a] sentence in a conference report cannot rewrite unambiguous statutory text." *Id.* at 75.[2]

b. The Eighth Circuit took the same approach two years earlier in *Neosho R-V School District* v. *Clark*, 315 F.3d 1022 (8th Cir. 2003). It upheld the district court's refusal in that case to award expert fees under the IDEA.

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[2] Judge Rogers dissented. Relying on the same line of analysis adopted by the Second Circuit in this case, she reasoned that the reference to expert fees in the conference report accompanying IDEA's fee-shifting provision distinguished this Court's decisions in *Casey* and *Crawford* and required a different interpretation of the statute's text. See 416 F.3d at 79-83. Accordingly, Judge Rogers concluded that "the statutory phrase 'attorney's fees as part of the costs' * * * authorize[d] the shifting of fees for experts' services." *Id.* at 82. As respondents noted (Br. in Opp. 3 n.1), the parents petitioned for rehearing in *Goldring*. On November 10, 2005, that rehearing petition was denied.

The court explained that the "'apparent effort' to define a term of art in the legislative history [was] an unsuccessful one" because Congress had not engaged in the sort of "'explicit statutory' authorization" required under *Crawford* to "exceed the limitations of the general cost statutes." *Id.* at 1032. The court also explained that "costs" "is an ordinary term with which federal judges are well acquainted" and that "[a]bsent a specific definition of costs" in the statutory text, courts must "look to the general provisions providing for the taxation of costs in federal courts as a matter of course." *Id.* at 1031.

c. The Seventh Circuit in *T.D.* v. *LaGrange School District No. 102*, 349 F.3d 469, 481 (7th Cir. 2003), expressly "agree[d] with the Eighth Circuit's reasoning and conclusion" in *Neosho*. It too held that, under *Crawford* and *Casey*, an "explicit statutory authorization was necessary to allow courts to exceed the limitations under 28 U.S.C. § 1821 and § 1920," and that no authorization was present in the IDEA. *Id.* at 482. The court similarly refused to find such authorization in the legislative history of IDEA's fee-shifting provision. *Ibid.*

d. In contrast, the Second Circuit below expressly rejected the reasoning of the Seventh and Eighth Circuits, Pet. App. 7a-8a, and squarely held that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions." *Id.* at 8a. In so holding, the Second Circuit grounded its interpretation on the same language in the conference report that the Seventh, Eighth, and District of Columbia Circuits expressly rejected. *Id.* at 9a-11a. Indeed, the court reasoned that this Court's reference to that legislative history in *Casey* actually "require[d]" the court

to construe IDEA to authorize the recovery of expert fees. *Id.* at 9a.[3]

2. Respondents suggest (Br. in Opp. 3) that granting a writ of certiorari in this case would be premature because several circuits have yet to address the question whether expert fees are available under IDEA's fee-shifting provision. For several reasons, that suggestion should be rejected. First, the conflict that does exist is clear and sufficiently developed to warrant the Court's review at this time. This Court generally does not wait until all the Circuits have spoken before addressing an issue on which they have divided. Second, the question whether expert fees are recoverable under IDEA is frequently recurring and the Second Circuit's decision in this case could lead to increased litigation costs for parents and schools and divert attention and resources from the core purposes of IDEA. As this Court recently emphasized, "there is reason to believe that a great deal is already spent on the administration of the [IDEA]" and "Congress has * * * repeatedly amended the Act in order to reduce its administrative and litigation-related costs." *Schaffer* v. *Weast*, 126 S. Ct. 528, 535 (2005). Third, the Second Circuit's rule is likely to have a

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[3] Both the Second Circuit below and the District of Columbia Circuit in *Goldring* interpreted the Third Circuit's decision in *Arons* v. *New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), cert. denied, 488 U.S. 942 (1988), as holding—in line with the Second Circuit—that expert fees are recoverable under the IDEA's fee-shifting provision. See Pet. App. 7a n.5, 13a; *Goldring*, 416 F.3d at 73. Respondent also has interpreted *Arons* as adopting the same approach as the Second Circuit on this issue. Br. in Opp. 3-4. The Third Circuit in *Arons* stated that "nothing prevents [an expert] from receiving compensation for work done as an expert consultant." 842 F.2d at 62. The court did not, however, directly address whether IDEA itself authorizes the award of such fees to the prevailing parents. Accordingly, it is not clear that the Third Circuit has squarely taken a position on this issue.

significant impact on schools in that Circuit alone, because a substantial percentage of all litigation under IDEA takes place within the Second Circuit and, in particular, in New York.[4] Fourth, the Second Circuit's position conflicts not just with decisions of other circuits, but with the text of IDEA and this Court's precedents, as well.

Furthermore, this case presents a good vehicle to resolve the existing circuit conflict. The case squarely presents the question whether expert fees are recoverable under the IDEA's fee-shifting provision. The Second Circuit directly addressed that question. And this case presents a common fact pattern in which the question has arisen, *i.e.*, where prevailing parents seek fees for expert consulting services in IDEA litigation.[5]

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[4] See General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts*, No. GAO 03-897, 13-14 (Sept. 2003) (finding that nearly 80% of all due process hearings nationwide under IDEA occur in just five States and the District of Columbia and that New York has the highest rate of due process hearings per 10,000 students receiving special education benefits of any State).

[5] Expert consulting services typically include reviewing materials gathered by teachers and administrators, observing the student in class, interviewing teachers and administrators, attending IEP meetings, contacting various schools regarding placement possibilities, preparing technical reports, and advising parents in their decision-making. See *Arons*, 842 F.2d at 60; *J.S.* v. *Ramapo Cent. Sch. Dist.*, 165 F. Supp. 2d 570, 572 (S.D.N.Y. 2001); *Coale* v. *State Dep't of Educ.*, 162 F. Supp. 2d 316, 321 (D. Del. 2001); *Connors* v. *Mills*, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998); *Straube* v. *Florida Union Free Sch. Dist.*, 801 F. Supp. 1164, 1178 n.13 (S.D.N.Y. 1992); *In re Arons*, 756 A.2d 867, 868 (Del. 2000), cert. denied, 532 U.S. 1065 (2001). Such expert services of Arons herself have been the subject of a number of reported decisions. See *Arons*, 842 F.2d at 60; *J.S.*, 165 F. Supp. 2d at 572; *Coale*, 162 F. Supp. 2d at 321; *Connors*, 34 F. Supp. 2d at 799; *Straube*, 801 F. Supp. at 1178 n.13; *In re Arons*, 756 A.2d at 869. While the question presented

### B. The Second Circuit Rule That Expert Fees Are Recoverable Under IDEA Contradicts Both The Express Terms Of The Act And This Court's Precedents

The Second Circuit's ruling that IDEA authorizes the reimbursement of expert fees is inconsistent with both the plain terms of IDEA and with this Court's decisions.

1. a. The text of IDEA unambiguously authorizes only the award of attorneys' fees—and not expert fees—to parents who prevail in IDEA litigation. Section 1415(i)(3)(B) provides that courts "may award reasonable attorneys' fees as part of the costs." 20 U.S.C. 1415(i)(3)(B). It nowhere mentions "expert fees." That omission is particularly telling because Congress knows how to expressly authorize the award of both "attorney's fees" and "expert fees," and has done so in numerous other statutes. See *Casey*, 499 U.S. at 89 (noting that "[a]t least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees *and* expert witness fees"). The text of IDEA's fee-shifting provision thus conclusively demonstrates that Congress authorized reimbursement of only "attorneys' fees."[6]

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also has arisen in the context where prevailing parents have sought fees for experts who have testified at a due process hearing, there is no reason to conclude that the availability of a fee award under IDEA would turn on the type of expert services provided.

[6] That conclusion is bolstered by Section 1415(i)(3)(F), which directs a court to reduce "the amount of attorneys' fees awarded under this section" whenever it finds certain specified facts that are explicitly directed to "attorneys" and "legal services." 20 U.S.C. 1415(i)(3)(F). If Congress intended Section 1415(i)(3)(B) to authorize the reimbursement of expert fees as well as attorneys' fees, there is no reason to believe that Congress would have gone to such great lengths in Section 1415(i)(3)(F) to identify circumstances in which an award of *attorneys'* fees should be reduced but have remained silent as to *expert* fees.

Section 1415(i)(3)(B)'s reference to "costs" cannot be interpreted without regard to the immediately preceding phrase "attorneys' fees," and, in any event, the reference to "costs" may not be construed to include "expert fees." The costs that a judge or clerk of "any court of the United States may tax" are statutorily defined in 28 U.S.C. 1920. The only recoverable costs that might apply to an expert in an IDEA action are found in 28 U.S.C. 1920(3): "Fees and disbursements for printing and witnesses." But those fees are limited to those set out in 28 U.S.C. 1821, *i.e.*, travel expenses and a per diem of $40. See, *e.g.*, *Sierra Club* v. *EPA.*, 769 F.2d 796, 812 (D.C. Cir. 1985) (denying request for compensation for a "technical consultant" because his services did "not fall under the traditional concept of costs * * * which ordinarily encompasses items such as filing fees or other court costs"). The expert fees at issue in this case are for consulting services, not for a witness, and are not capped at $40 per diem. And, needless to say, if expert consulting fees are neither attorney's fees nor costs they cannot come within the authorization for recovering "attorneys' fees as part of the costs."

b. The background principles against which IDEA must be construed also preclude any interpretation of the phrase "attorneys' fees as part of the costs" to authorize the award of expert fees. IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. See *Schaffer*, 126 S. Ct. at 531-532; *Board of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11 & 204 n.26 (1982); *Cedar Rapids Comm. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"). Given this Court's repeated admonition that "if Congress

intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)), there would no basis to hold that, in the face of statutory and regulatory silence, IDEA nevertheless conditions federal funds on the requirement that States may be required to pay expert fees *in addition to* attorneys' fees to parents who prevail in an action or proceeding under the Act.

2. A plain-meaning interpretation of IDEA's fee-shifting provision is similarly compelled by this Court's decisions. In *Casey*, the Court addressed whether the then-current version of 42 U.S.C. 1988 authorized the award of fees to the prevailing party for the services of experts in civil rights litigation. At the time, Section 1988 authorized courts in various civil rights actions to award "a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988; see 499 U.S. at 84-85 & n.1. The fee-shifting provision of Section 1988 at issue in *Casey* thus contained language identical to the key language of IDEA's fee-shifting provision at issue here. See 20 U.S.C. 1415(i)(3)(B) (court may award "reasonable attorneys' fees as part of the costs").

This Court in *Casey* explained that Sections 1920 and 1821 "define the full extent of a federal court's power to shift litigation costs absent express statutory authorization to go further." *Casey*, 499 U.S. at 86. As the Court had previously held in *Crawford*, Section 1920 is "an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts." *Id.* at 87 (citing *Crawford*, *supra*). Because Section 1920 does not authorize "fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity," such fees are not compensable absent "explicit statutory authority." *Ibid.* And, with respect to testifying expert witnesses, "ex-

plicit statutory authority" is necessary to overcome Section 1821's limitation on fees for such experts. *Ibid.* Thus, the Court held, the term "costs" does not include fees for experts who do not testify, nor does it include fees for a testifying expert in excess of those provided by Section 1821. *Id.* at 87 & n.3.

*Casey* therefore rejected the contention that expert fees could be part of the "costs" allowed by Section 1988. 499 U.S. at 87 n.3. Instead, the Court explained, the question before it was whether the term "attorney's fee" in Section 1988 provides the required "explicit statutory authority" necessary for a district court to award both testimonial and nontestimonial expert fees. *Id.* at 87. The Court held that it did not, primarily because "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88. If "attorney's fees" included expert fees, the Court reasoned, then "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy." *Id.* at 92. In addition, when Congress enacted Section 1988, court cases showed that expert fees were not considered an element of attorney's fees. *Ibid.* The Court also rejected petitioner's reliance on legislative history, and emphasized that where the statutory text "contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.* at 98-99.

Because the key language in IDEA's fee-shifting provision ("attorneys' fees as part of the costs") is identical to the statutory language at issue in *Casey*, *Casey* compels the conclusion that IDEA's fee-shifting provision does not authorize reimbursement for expert fees. See *Goldring*, 416

F.3d at 73 ("[t]he correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees"); *LaGrange*, 349 F.3d at 482 (finding that IDEA fee-shifting provision does not authorize award of expert witness fees, "particularly, in light of the fact that the Supreme Court in *Casey* found that the same words used in the former § 1988 ('reasonable attorney's fee as part of costs') did not provide the necessary explicit statutory authorization"); *Neosho*, 315 F.3d at 1032-1033 (noting that *Casey* "specifically indicated that the term 'costs' should be construed narrowly as not including expert witness fees").

3. As the District of Columbia Circuit concluded in *Goldring*, the Second Circuit's attempts to distinguish *Casey* and *Crawford* are flawed. First, recourse to legislative history to determine whether Congress intended to shift expert fees in the IDEA "is simply unwarranted" because in *Casey*, this Court held that the phrase "attorneys' fees as part of the costs" is clear and unambiguous and warned against resort to committee reports to cloud unambiguous text. 416 F.3d at 74; see *LaGrange*, 349 F.3d at 483; *Neosho*, 315 F.3d at 1032. As this Court recently reiterated, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). For that reason, the Second Circuit erred by relying on a statement in a committee report accompanying the fee-shifting provision to depart from the plain meaning of the text of that provision. See *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) (courts should "not resort to legislative history to cloud a statutory text that is clear").

Second, as the District of Columbia, Seventh, and Eighth Circuits have all properly concluded, the dicta in a footnote in *Casey* upon which the Second Circuit relied does not warrant a different interpretation of IDEA's fee-shifting provision. In that footnote, the Court responded to an argument made by respondent in that case by describing the statement in the committee report relied on by the Second Circuit as merely "an apparent effort to depart from ordinary meaning and to define a term of art." 499 U.S. at 92 n.5. But in light of the plain meaning of the statutory text, "this 'apparent effort' to define a term of art in legislative history is an unsuccessful one." *Neosho*, 315 F.3d at 1032; accord *LaGrange*, 349 F.3d at 482; *Goldring*, 416 F.3d at 75. The statement simply does not constitute the type of "explicit authority" required to allow an award of expert fees beyond the limitations of the general cost statutes. *Casey*, 499 U.S. at 86-87; *Neosho*, 315 F.3d at 1031.

The Second Circuit's effort to attach significance to the fact that Justice Scalia was the author of the *Casey* footnote is also without merit. Pet. App. 10a-11a. The opinion in *Casey* was written for the Court, not a single Justice. Nothing in the footnote indicates that the Court would deem the committee report's "apparent effort" to supplement the statutory text to have been a *successful* effort. To the contrary, the Court in *Casey* made clear that it is improper even to look to legislative history where, as there and here, a statutory term is unambiguous. See 499 U.S. at 99-100. This case involves precisely the same statutory terms and calls for the same result.

Third, the Second Circuit further erred by concluding that it was "reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in

the Conference Committee Report that prevailing parties could recover expert fees under the Act." Pet. App. 10a. As the District of Columbia Circuit pointed out in *Goldring*, it is more reasonable to infer from Congress's failure to amend IDEA's fee-shifting provision following *Casey* that "Congress had no intention of allowing recovery of expert fees under the IDEA." 416 F.3d at 76. This is so because (1) at most, *Casey* stated that the committee report was only an "apparent effort" by the congressional committee to depart from the ordinary meaning of the statutory phrase "attorneys' fees as part of the costs"; (2) *Casey* did not include IDEA as an example of a statute that authorizes the shifting of both attorney's fees and expert fees; and (3) "the version of section 1988 construed in *Casey* is nearly identical to section 1415." *Ibid.*[7]

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[7] The court of appeals' inference is belied further by the fact that Congress, in 2004, considered but did not adopt a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to explicitly authorize an award of expert fees. See S. 2088, 108th Cong. 2d Sess. (2004); H.R. 3809, 108th Cong. 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes" and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." See S. 2088, *supra*, §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorney's fees.'" S. 2088, *supra*, § 523(e). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress. Congress remains free to address this issue as it sees fit, but this Court should resolve the circuit split on the meaning of IDEA's existing fee-shifting provision.

Finally, the Second Circuit's reliance on IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education is misplaced. Pet. App. 11a-12a. As the District of Columbia Circuit explained, where, as here, the language of the statute is clear, such policy arguments are insufficient to overcome the express intent of Congress. *Goldring*, 416 F.3d at 76-77. Indeed, in recently holding that parents who initiate due process hearings under the IDEA bear the burden of proving their claims, this Court emphasized that "the touchstone of our inquiry is, of course, the statute," and found no reason to depart from the ordinary rule that the burden of proof falls on the party seeking relief. *Schaffer*, 126 S. Ct. at 534. So too, there is no reason to depart from ordinary rules of statutory interpretation here. That is particularly true given that one of the goals of IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act. See *Schaffer*, 126 S. Ct. at 535 (discussing the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647). Holding that the Act authorizes the award of expert fees would have precisely the opposite effect.

### C. The Grant Of Certiorari Should Be Limited To The First Question Presented By The Petition

The petition for a writ of certiorari states two questions: (1) whether IDEA's fee-shifting provision authorizes a court to award "'expert' fees"; and (2) whether IDEA's fee-shifting provision authorizes a court to award fees "for the services for an 'educational consultant.'" Pet. i. There is no reason, however, to parse out two conceptually distinct questions in this case. The question on which the circuits are split and that warrants resolution by this Court is whether IDEA's fee-shifting provision authorizes reim-

bursement of expert fees to prevailing parents. That issue is squarely presented by the Second Circuit's decision in this case holding that respondents are entitled to recover fees for expert services provided by Arons. See Pet. App. 8a ("Congress intended to and did authorize the reimbursement of expert fees in IDEA actions").

Petitioner argues (Pet. 25-28) that the court of appeals' decision encourages the unauthorized practice of law by allowing an award of expert fees for the services of a non-lawyer educational consultant and that the court erred because Arons's "special knowledge or training" was never formally established. Those arguments do not support a separate question presented, nor do they warrant this Court's review. The court of appeals below rejected any fees for Arons's services as a non-attorney advocate, Pet. App. 4a-5a, 38a-43a, and respondents have not challenged that aspect of the court's decision. In any event, the question whether the courts below drew the appropriate line between expert consultation services and non-attorney advocate services, or whether the courts properly found that Arons possessed "special knowledge or training" related to the services she provided, are fact-bound and do not implicate any conflict among the circuits. Accordingly, those questions do not warrant further review.[8]

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[8] In *Arons* v. *Office of Disciplinary Counsel*, 531 U.S. 1034 (2000), this Court called for the views of the Solicitor General on whether IDEA, 20 U.S.C. 1415(h)(1), establishes a federal right to non-lawyer representation in due process hearings. The case arose after state authorities instituted proceedings against an expert consultant (Marilyn Arons) for the unauthorized practice of law. The United States responded that, consistent with the longstanding position of the Department of Education, States that accept funds under IDEA are required to allow qualified non-lawyers to represent parents at due process hearings. See No. 00-509 U.S. Br. 9-12. That issue is not presented by this case, which, as discussed, involves the question

## CONCLUSION

The petition for a writ of certiorari should be granted limited to the first question presented.

Respectfully submitted.

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whether prevailing parents may be awarded fees under IDEA for expert consulting (but not advocate) services.